U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 03 May 2005

CASE NO.: 2004-BLA-5440

In the Matter of:

EDD T. CARROLL,
Claimant,

v.

VOLUNTEER MINING CORPORATION,
Employer,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party-in-Interest.

Appearances:

Timothy P. Webb, Esquire
For Claimant

Debra L. Fulton, Esquire
For the Employer

Mary Sue Taylor, Esquire
For the Director

Before: STEPHEN L. PURCELL
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This proceeding arises from a request for modification under the Black Lung Benefits Act, 30 U.S.C. § 901 *et seq.* In accordance with the Act and the pertinent regulations, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs for a formal hearing.

A formal hearing was held on June 29, 2004 in Knoxville, Tennessee, at which all parties were afforded the opportunity to present evidence and argument as provided in the Act and the regulations issued thereunder, found at Title 20, Code of Federal Regulations. The following

evidence has been submitted without objection and will be admitted into evidence: Employer's exhibits 1-6 (hereinafter referred to as "EX"). Also admitted into evidence are Director's exhibits 1 through 55 (hereinafter referenced as "DX"). All of this evidence has been made part of the record.

The parties were offered an opportunity to submit written closing arguments. Employer has filed a written closing argument.

ISSUES

The issues presented in this claim are:

1. Whether the claim was timely filed
2. Whether the person upon whose disability the claim is based is a miner.
3. Whether Claimant suffers from pneumoconiosis arising out of coal mine employment.
4. Whether Claimant is totally disabled due to pneumoconiosis.
5. Whether the named employer is the responsible operator.
6. Whether the evidence establishes a material change in conditions pursuant to 20 C.F.R. § 309.

DX 52. Employer has also raised additional issues which are not properly before the undersigned. DX 52. Those issues are noted and reserved.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Procedural History and Factual Background

Edd T. Carroll (hereinafter referred to as "Claimant") filed a claim for benefits under the Act on February 19, 1980. DX 1. It was denied by a Claims Examiner on December 15, 1980, on the grounds that Claimant had failed to establish the existence of pneumoconiosis due to coal mine work or total disability due thereto. DX 1. Claimant requested additional time in which to file evidence, which request was granted. No new evidence was provided by Claimant within the sixty additional days provided to him.

Claimant filed a second application for benefits on March 10, 2000. DX 2. It was denied on June 8, 2000, the Claims Examiner determining that Claimant had failed to establish the existence of pneumoconiosis due to coal mine employment and total disability due thereto.

Claimant did not appeal that decision, however, on May 10, 2002, he filed his third application for benefits. DX 4. A Proposed Decision and Order – Denial of Benefits was issued by the District Director on September 23, 2003. DX 46. Claimant filed a timely request for a hearing, and this matter was referred to the Office of Administrative Law Judges on December 12, 2003. DX 48, 52.

Claimant testified that he has difficulty breathing and he is on a breathing machine. TR

24-25. He smoked cigarettes for about eight years, having quit smoking thirty-two years ago. TR 31. His wife, Bonnie, whom he married on July 4, 1972 and his daughter, Amy, who is a full-time student, are his dependents for purposes of possible benefits augmentation. DX 1, 4, 8, TR 34.

Timeliness

Under §725.308(a), a claim of a living miner is timely if it is filed "within three years after a medical determination of total disability due to pneumoconiosis" has been communicated to the miner. Section 725.308(c) creates a rebuttable presumption that every claim for benefits is timely filed. Because the record contains no evidence that the Claimant received the requisite notice more than three years prior to filing this claim for benefits, I find that his claim was timely filed.

Coal Mine Employment

A "miner" is defined for purposes of the Act as "any person who works or has worked in or around a coal mine or coal preparation facility in the extraction, preparation, or transportation of coal . . . ." 20 C.F.R. §725.202(a). On his application form, Claimant stated that he engaged in coal mine employment for 16 years ending in 1974, when he became disabled because a rock fell and injured his back. DX 4. On the Employment History form, dated May 6, 2002, Claimant listed numerous coal mine and non-coal mine jobs. DX 5. Claimant testified that he began working as a coal miner in the late 1950's and that his coal mining jobs including loading coal, working on various mining machinery, and operating a roof bolter. TR. 20-22. I thus find that Claimant is a "miner" with respect to this claim.

With regard to the amount of time Claimant was employed as a coal miner, the dates of employment noted by him in the record are imprecise and at odds with Social Security records (DX 5; *Compare* DX 9). Similarly, Claimant's testimony at the formal hearing regarding his years of coal mine employment was quite vague and inexact. TR 19-22, 32-34. Employer stipulated at the formal hearing that Claimant had established at least 3.5 years of coal mine employment. TR 6. The District Director's office calculated that Claimant established a total of 7 years of coal mine employment based primarily on Social Security records. DX 46. Based upon my *de novo* review of the record, I find that the Social Security records are the most credible evidence regarding the length of coal mine employment issue. Furthermore, I find that the District Director's analysis, as set forth in DX 46, was accurate. Accordingly, I find that Claimant has established 7 years of coal mine employment.

Responsible Operator

Employer has contested its status as the responsible operator herein. The Social Security Administration's Statement of Earnings shows employment with Indian Creek Coal Company from 1971 through the first quarter of 1973. Those records then show employment with Volunteer Mining Corporation for the last two quarters of 1973 and the first quarter of 1974. It is the Director's position that, despite the fact that Claimant did not work for it for one full year, Volunteer Mining Corporation is a "successor operator" and has been properly designated as the

responsible operator herein. DX 37.

Claimant's testimony as well as the Social Security Administration's records confirm that Claimant did not work a full year at Volunteer Mining Corporation.[1] DX 9, TR 34. The evidence indicates that Claimant worked for Indian Creek Coal Company for a period of over one year immediately prior to his employment with Volunteer Mining Corporation.

Counsel for the Director has submitted records establishing that Indian Creek Coal Company, Inc. was incorporated and qualified to do business in the State of Tennessee from January 1974 until May 1981, when it merged with Volunteer Mining Corporation, the surviving corporation being the latter. DX 53. Records regarding Volunteer Mining Corporation were also submitted, indicating that it was chartered in October 1967 and was thereafter dissolved in November 1986. DX 54. Records maintained by the U.S. Department of Labor's Responsible Operator Section show that Old Republic Insurance Company was the carrier for both Volunteer Mining Corporation and Indian Creek Coal Company at all relevant times. *See* DX 37.

Volunteer argues that it is not the responsible operator in this case because Claimant worked for it for less than one year and his prior employment with Indian Creek cannot be attributed to Volunteer as a "successor operator" since it did not acquire Indian Creek until after Claimant's retirement as a coal miner. This argument, however, misses the point. Even if Claimant had never worked for Volunteer, Congress intended to make Volunteer liable for payment of benefits to miners who were employed by any mine operator which it acquired where the prior mine operator would have been obligated to pay benefits to those miners. When Volunteer acquired the assets of Indian Creek, it acquired its liabilities as well, and the fact that Claimant left Indian Creek and thereafter worked for Volunteer is irrelevant to the issue of whether Volunteer is a "successor company" to Indian Creek under the statute and regulations.

Claims for federal Black Lung Benefits arise under the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Reform Act ("BLBRA") of 1977. 30 U.S.C. §§ 901- 945. The BLBRA amended 30 U.S.C. § 932(i) to provide that any mine operator who acquired a mine or substantially all of its assets on or after January 1, 1970, from a mine operator who was an operator on or after January 1, 1970, will be liable for payment of all benefits that would have been payable to miners previously employed by such prior operator as if the acquisition had not occurred. Consistent with this provision, the Department's regulations provide:

> Any person who, on or after January 1, 1970, acquired a mine or mines, or substantially all of the assets thereof, from a prior operator, or acquired the coal mining business of such prior operator, or substantially all of the assets thereof, shall be considered a "successor operator" with respect to any miners previously employed by such prior operator.

20 C.F.R. § 725.492(a) (2004). Thus, the last successor operator who acquired a mine or

1 The Social Security records also show employment for periods of less than one year after Volunteer with two other coal mines, *i.e.*, Buffalo Coal Co. Inc. during the third and fourth quarters of 1974 and Queen Ann Coal Co. in the second quarter of 1974. DX 9.

substantially all of its assets on or after January 1, 1970, shall, if found financially capable, be liable for payment of all benefits.

Claimant was previously employed by Indian Creek Coal Company, Indian Creek was the last coal mine operator for which Claimant was employed for more than one year, Indian Creek was acquired by Volunteer after January 1, 1970, and Volunteer is therefore liable for payment of benefits to Claimant that would have been payable to him by Indian Creek had it not been acquired by Volunteer.

DUPLICATE CLAIM

This claim relates to a "subsequent" claim filed on May 10, 2002, Claimant having previously filed claims in 1980 and 2000, the latter having been finally denied that same year. Because the claim at issue was filed after March 31, 1980, the Regulations at 20 C.F.R. Part 718 apply. 20 C.F.R. § 718.2. Pursuant to 20 C.F.R. § 725.309(d), in order to establish that he is entitled to benefits, Claimant must now demonstrate that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final" such that he now meets the requirements for entitlement to benefits under 20 C.F.R. Part 718. In order to establish entitlement to benefits under Part 718, Claimant must establish that he suffers from pneumoconiosis, that his pneumoconiosis arose out of his coal mine employment, and that his pneumoconiosis is totally disabling. 20 C.F.R. §§ 718.1, 718.202, 718.203 and 718.204. I must consider the new evidence and determine whether Claimant has proved at least one of the elements of entitlement previously decided against him. If so, then I must consider whether all of the evidence establishes that he is entitled to benefits. *Sharondale Corp. v. Ross*, 42 F.3d 993 (6th Cir. 1994). In the instant matter, it was determined that Claimant had failed to establish the existence of pneumoconiosis due to coal mine employment or total disability due to the disease. Accordingly, the newly submitted medical evidence will be reviewed in order to determine whether any element previously decided against Claimant has now been established.

Newly Submitted Medical Evidence

Chest X-ray Evidence

Exhibit No.	*Date*	*Physician and Qualifications*	*Interpretation*
DX 13	07-15-02	Goldstein B	Quality 2
DX 13	07-15-02	Kelly	p/t 2/2
DX 14	07-15-02	Wiot B BCR	no pneumo
DX 14	07-15-02	Spitz B BCR	no pneumo
DX 14	07-15-02	Perme B BCR	no pneumo
DX 17	07-15-02	Crater	interstitial lung disease
DX 17	04-21-03	Bosak	interstitial lung disease
EX 3	04-21-03	Wiot B BCR	no pneumo
EX 1	07-03-03	Wiot B BCR	no pneumo
EX 2	07-03-03	Spitz B BCR	no pneumo

Pulmonary Function Studies

Exhibit/ Date/ Physician	*Height*	*Age*	*FEV1*	*FVC*	*MVV*	*FEV1/ FVC*	*Qualify*
DX 13 07-15-02 Kelly	74[2]	63	.87	2.06	33	42%	Yes
DX 13 09-10-02 Kelly	74 post-bronchodilator	63	1.59 1.40	3.23 2.91	37	49% 48%	Yes
DX 17 10-15-02 Crater	74	63	2.38	4.04		59%	No
DX 16 07-03-03 Hudson	72	64	1.64	3.67		45%	Yes

Dr. John Michos found the study conducted on July 15, 2002 to be invalid due to less than optimal effort, cooperation and comprehension, noting that there were suboptimal flow volume loops. DX 13. He also found the study conducted on September 10, 2002 to be invalid due to less than optimal effort, cooperation and comprehension. DX 13. Dr. Michos recorded, with regard to the latter test, that there was a greater than 5% variation between the two best FVC and FEV1 values and suboptimal MVV performance. Dr. Michos is board-certified in internal medicine and pulmonary disease.

Dr. Bruce Broudy reviewed the pulmonary function studies conducted on July 3, 2003 and September 10, 2002. DX 15, 16. He found that they were not valid due to Claimant's variable and suboptimal effort. After reviewing the pulmonary function study conducted on October 15, 2002, Dr. Broudy found that the study was not valid as well. DX 16. Dr. Broudy noted that there was excessive variability in the FVC between trials and that Claimant's effort was variable and suboptimal at times. Dr. Broudy also found the study conducted at East Tennessee Pulmonary Associates on July 15, 2002, to be invalid due to variable and suboptimal effort. DX 16, EX 4. Dr. Broudy noted that although he suspected that Claimant may have significant obstructive airways disease, the tracings were invalid. Dr. Broudy is board-certified in internal medicine and pulmonary disease.

2 The fact-finder must resolve conflicting heights of the miner recorded on the ventilatory study reports in the claim. *Protopappas v. Director, OWCP,* 6 B.L.R. 1-221, 1-223 (1983); *Toler v. Eastern Assoc. Coal Co.,* 43 F.3d 109, 114, 116 (4th Cir. 1995). As there is a variance in the recorded heights of the miner, I have taken the average height (73.5 inches) in determining whether the studies qualify to show disability under the regulations.

Arterial Blood Gas Tests

Exhibit No.	*Date*	*Physician*	*PCO2*	*PO2*	*Qualify*
DX 13	07-15-02	Kelly	35.2	52.8	Yes

Dr. J. Michos found the study conducted on July 15, 2002 to be valid. DX 13.

Physician Opinion of Dr. Peter Bosak

Dr. Peter Bosak submitted a letter dated April 24, 2003, wherein he stated that Claimant has been under his care since December of 2001. DX 17. According to Dr. Bosak, Claimant suffers from pneumoconiosis and emphysema which is related to occupational coal dust exposure. Claimant's disease was very advanced requiring 24 hour continuous oxygen use and his most recent chest x-ray from April 21, 2003 was consistent with his diagnosis, also showing increased interstitial markings, bilateral fibrotic changes and severe emphysema changes. Dr. Bosak stated that Claimant also suffered from hyperlipidemia which was controlled with medication.

Physician Opinion of Dr. Keith Kelly

Dr. Keith Kelly examined Claimant on July 15, 2002. DX 13. He recorded a total of sixteen year of coal mine employment and a smoking history of half a pack per day from when Claimant was in his 20s until he was in his 30s. He listed Claimant's chief complaints as sputum, wheezing, dyspnea, cough, hemoptysis, chest pain, orthopnea and paroxysmal nocturnal dyspnea. Upon examination, he noted no clubbing, edema, or varicosities. Based upon his examination, which included the taking of a chest x-ray, pulmonary function testing and blood gas studies, Dr. Kelly diagnosed coal worker's pneumoconiosis due to coal dust exposure. He found Claimant to be 100% disabled due to coal worker's pneumoconiosis and idiopathic emphysema, which he felt to be secondary to occupational exposure. Dr. Kelly also submitted records of an examination of Claimant which occurred on April 7, 2003. DX 17. Those records indicate that Claimant's problems are (1) interstitial lung disease with COPD; (2) coal worker's pneumoconiosis; and (3) totally disabled. Dr. Kelly listed an Impression which included allergic rhinitis and coal worker's pneumoconiosis. The record notes that Claimant was wearing oxygen.

Physician Opinion of Glenn D. Crater

Dr. Glenn D. Crater recorded that Claimant came in on October 15, 2002, for a second opinion regarding his lung disease. DX 17. A history of having smoked tobacco from his early 20s and stopping around age 33 years was recorded, Claimant having smoked half a pack of cigarettes per day. A physical examination was performed and a chest x-ray was reviewed, as were pulmonary function results. Based upon his review of the records and his examination of Claimant, Dr. Crater diagnosed emphysema of uncertain etiology. Dr. Crater found that the minimal smoking history did not explain the degree of obstructive lung disease which was present and that occupational exposures should be considered in Claimant's differential. Dr. Crater noted that Claimant was exposed to "very smoky conditions" in the mine where he

worked and prolonged exposure to this could contribute to emphysema. Dr. Crater also found that the "suggestion on x-ray of increased interstitial markings" was worrisome for coal worker's pneumoconiosis. It was his opinion that Claimant's interstitial lung disease as well as the emphysema were causing significant and total disability, given Claimant's marked hypoxia.

Physician Opinion of Dr. Lawrence Repsher

Dr. Lawrence Repsher reviewed the medical evidence by report dated February 26, 2004. EX 5. Those records revealed a cigarette smoking history of one pack per day from when Claimant was in his early 20's until the age of 33 years. In his opinion, there was no objective evidence to justify a diagnosis of coal worker's pneumoconiosis or legal pneumoconiosis. He did find a moderately severe pulmonary impairment to be present which had arisen from Claimant's former cigarette smoking and recurrent bouts of bronchitis. While Dr. Repsher found a totally disabling respiratory impairment, in his opinion, it was not related to coal mine dust inhalation but to Claimant's cigarette smoking history. Dr. Repsher is board-certified in internal medicine, pulmonary disease and critical care medicine.

By letter dated March 25, 2004, Dr. Repsher stated that he had reviewed his report of February 26, 2004 and had additional comments. EX 5. It was his opinion that although Claimant had no radiographic evidence of simple coal worker's pneumoconiosis, one could not rule out the presence of histologic simple coal worker's pneumoconiosis. Dr. Repsher remarked that Claimant did have moderately severe COPD due to his cigarette smoking. It was his opinion that it would be very unlikely for an individual coal miner to have clinically significant obstructive disease as a result of the inhalation of coal mine dust. Dr. Repsher found that Claimant's pulmonary function abnormalities were more than adequately explained by his COPD due to cigarette smoking.

Physician Opinion of Dr. Gregory Fino

Dr. Gregory Fino reviewed the medical evidence by report dated February 18, 2004. EX 6. Based upon that review, Dr. Fino found the pulmonary function study and blood gas studies conducted on July 15, 2002 to be invalid. He also found the pulmonary function studies conducted on September 10, 2002, October 15, 2002 and July 3, 2003 studies to be invalid. Dr. Fino opined that there was insufficient objective medical evidence to justify a diagnosis of coal worker's pneumoconiosis, further finding no respiratory impairment to be present. From a pulmonary standpoint, Dr. Fino found Claimant neither partially nor totally disabled from returning to his last coal mining job.

In a follow-up letter dated March 29, 2004, Dr. Fino stated that to assess pulmonary impairment, there must be measurements of objective pulmonary parameters such as arterial blood gases at rest and with exercise or other measurements of oxygen consumption. EX 6. Similarly, an invalid pulmonary function study indicates poor patient effort and the values recorded can only represent the minimum lung function of the patient. Dr. Fino is board-certified in internal medicine and pulmonary disease.

Existence of Pneumoconiosis

The regulations define pneumoconiosis broadly:

> (a) For the purpose of the Act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or "clinical", pneumoconiosis and statutory, or "legal" pneumoconiosis.
>
> (1) *Clinical Pneumoconiosis.* "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silico-tuberculosis, arising out of coal mine employment.
>
> (2) *Legal Pneumoconiosis.* "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.
>
> (b) For purposes of this section, a disease "arising out of coal mine employment" includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.
>
> (c) For purposes of this definition, "pneumoconiosis" is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.

20 C.F.R. § 718.201.

20 C.F.R. § 718.202(a), provides that a finding of the existence of pneumoconiosis may be based on (1) chest x-ray, (2) biopsy or autopsy, (3) application of the presumptions described in §§ 718.304 (irrebuttable presumption of total disability due to pneumoconiosis if there is a showing of complicated pneumoconiosis), 718.305 (not applicable to claims filed after January 1, 1982) or 718.306 (applicable only to deceased miners who died on or before March 1, 1978), or (4) a physician exercising sound medical judgment based on objective medical evidence and supported by a reasoned medical opinion. There is no evidence that Claimant had a lung biopsy, and, of course, no autopsy has been performed. None of the presumptions apply, because the evidence does not establish the existence of complicated pneumoconiosis, Claimant filed his claim after January 1, 1982, and he is still living. In order to determine whether the evidence

establishes the existence of pneumoconiosis, therefore, I must consider the chest x-rays and medical opinions.

The newly submitted x-rays readings are primarily negative for pneumoconiosis. The record does contain a positive reading rendered by Dr. Kelly, who is neither a B-reader nor a board-certified radiologist. Dr. Bosak, who is also not a B-reader or a board-certified radiologist found interstitial markings, diagnosing coal worker's pneumoconiosis in his medical report. Every B-reader and board-certified radiologist who reviewed the x-rays taken since 2001, however, found that evidence to be negative for pneumoconiosis. Based upon those readings by the more highly qualified physicians, I find the x-ray evidence to be insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. § 718.202(a)(1).

I must next consider the medical opinion evidence. Claimant can establish that he suffers from pneumoconiosis by well-reasoned, well-documented medical reports. A "documented" opinion is one that sets forth the clinical findings, observations, facts, and other data upon which the physician based the diagnosis. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19, 1-22 (1987). An opinion may be adequately documented if it is based on items such as a physical examination, symptoms, and the patient's work and social histories. *Hoffman v. B&G Construction Co.*, 8 B.L.R. 1-65, 1-66 (1985); *Hess v. Clinchfield Coal Co.*, 7 B.L.R. 1-295, 1-296 (1984); *Justus v. Director, OWCP*, 6 B.L.R. 1-1127, 1-1129 (1984). A "reasoned" opinion is one in which the judge finds the underlying documentation and data adequate to support the physician's conclusions. *Fields,* above. Whether a medical report is sufficiently documented and reasoned is for the judge to decide as the finder-of-fact; an unreasoned or undocumented opinion may be given little or no weight. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149, 1-155 (1989) (en banc). An unsupported medical conclusion is not a reasoned diagnosis. *Fuller v. Gibraltar Corp.*, 6 B.L.R. 1-1291, 1-1294 (1984).

In the instant case, Dr. Bosak found pneumoconiosis to be present, as did Dr. Kelly. I find neither report to be well-reasoned or well-documented. These physicians appear to rely heavily upon their own positive readings of chest x-rays, while the more highly qualified physicians of record all read that evidence as negative for the disease. Neither physician sufficiently explained why the symptoms they found to be present were the result of coal mine dust exposure as opposed to Claimant's smoking history. Similarly, Dr. Crater finds that Claimant's occupational exposures should be considered in Claimant's differential, without providing an adequate explanation for his conclusions. His opinion is equivocal, given that he finds Claimant's emphysema to be of uncertain etiology, and as noted, opines that occupational exposures "should" be considered.

Dr. Fino, a pulmonary specialist, found pneumoconiosis to be absent. Dr. Repsher, who is also a pulmonary specialist, initially stated that there was no evidence of coal worker's pneumoconiosis or legal pneumoconiosis present, later stating, however, that one could not rule out the presence of histologic coal worker's pneumoconiosis. His report does not adequately explain this statement, which statement is equivocal at best. I find his opinion to be insufficient to meet Claimant's burden of proof on this issue. I also find the opinions of Drs. Bosak, Kelly and Crater insufficient to meet Claimant burden of proof, for the reasons stated above. Absent a well-reasoned, well-documented opinion that Claimant suffers from pneumoconiosis, I find the

newly submitted medical evidence insufficient to establish a change in conditions or the existence of pneumoconiosis pursuant to 20 C.F.R. § 718.202(a)(4).

Total Disability:

Claimant may still show a material change in condition if he can establish that the newly submitted evidence now establishes that he is totally disabled due to pneumoconiosis. Total disability is defined as the miner's inability, due to a pulmonary or respiratory impairment, to perform his or her usual coal mine work or engage in comparable gainful work in the immediate area of the miner's residence. § 718.204(b)(1)(i)and (ii). Total disability can be established pursuant to one of the four standards in Section 718.204 (b)(2) or the irrebuttable presumption of Section 718.304, which is incorporated into Section 718.204(b)(1). The presumption is not invoked here because there is no x-ray evidence of large opacities classified as category A, B, or C, and no biopsy or equivalent evidence.

Where the presumption does not apply, a miner shall be considered totally disabled if he meets the criteria set forth in Section 718.204(b)(2), in the absence of contrary probative evidence. The Board has held that under Section 718.204(c), the precursor to §718.204(b)(2), that all relevant probative evidence, both like and unlike, must be weighed together, regardless of the category or type, to determine whether a miner is totally disabled. *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986); *Rafferty v. Jones & Laughlin Steel Corp*., 9 BLR 1-231, 1-232 (1987). Furthermore, Claimant must establish this element by a preponderance of the evidence. *Gee v. W.G. Moore & Sons,* 9 BLR 1-4, 1-6 (1986).

Subsection (b)(2)(i) of §718.204 provides for a finding of total disability where pulmonary function tests demonstrate FEV1[3] values less than or equal to the values specified in the Appendix to Part 718 and such tests reveal FVC[4] or MVV[5] values equal to or less than the applicable table values. Alternatively, a qualifying FEV1 reading together with an FEV1/FVC ratio of 55% or less may be sufficient to prove disabling respiratory impairment under this subsection of the regulations. §718.204(c)(1) and Appendix B. In the instant case, every study which produced qualifying values was found to be invalid by pulmonary specialists. Accordingly, I do not find the invalidated studies to be conforming and therefore, find that the pulmonary function studies of record cannot assist Claimant in establishing total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).

Section 718.204(b)(2)(ii) provides for the establishment of total disability through the results of arterial blood gas tests. Blood gas tests may establish total disability where the results demonstrate a disproportionate ratio of pCO2 to pO2, which indicates the presence of a totally disabling impairment in the transfer of oxygen from Claimant's lung alveoli to his blood. § 718.204(c)(2) and Appendix C. The test results must meet or fall below the table values set

[3] Forced expiratory volume in one second.

[4] Forced vital capacity.

[5] Maximum voluntary ventilation.

forth in Appendix C following Section 718 of the regulations. The one newly submitted study did produce values indicative of total disability. Accordingly, I find that total disability has been established pursuant to subsection (b)(2)(ii).6

Claimant may also establish total disability under Section 718.204(b)(2)(iv), which provides that total disability may be found if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents the miner from engaging in his usual coal mine work or comparable gainful work.

Dr. Fino is the only physician who found that Claimant was not totally disabled due to a respiratory impairment. I find, based upon the opinions rendered by Drs. Kelly, Crater, Bosak and Repsher, that Claimant is totally disabled by a respiratory impairment. I further find, when weighing all the contrary probative evidence of record, that the blood gas study and medical opinion evidence are sufficient to outweigh same. Thus, total disability has been established pursuant to Section 718.204.

As total disability has been established, the evidence submitted in the prior claims filed by Claimant will be considered at this juncture. That evidence includes negative readings of an x-ray dated May 1, 2000, a qualifying pulmonary function study from May 1, 2000, which was found to be valid by Dr. Michos, a non-qualifying blood gas study conducted on that same date and the medical opinion of Dr. A. R. Hudson, who found that Claimant suffered from chronic obstructive bronchitis and emphysema due to cigarette smoking. DX 2. Dr. Hudson performed his examination on May 1, 2000 and found Claimant to be limited to sedentary activity only. A smoking history from 1960 to 1972 at the rate of half a pack per day was recorded as was coal mine employment from 1958 to 1974. Also to be considered is the evidence submitted with the claim filed in 1980, including negative x-ray readings by Drs. Cole and Swann, a non-qualifying pulmonary function study, a non-qualifying blood gas study, and a medical report from Dr. William Swann after an examination conducted on September 10, 1980, wherein Dr. Swann determined that Claimant did not have a diagnosed condition which was related to coal dust exposure. DX 1. Dr. Swann did note a smoking history of one pack per day for eight years, Claimant having quit smoking in 1972. Dr. Swann diagnosed bronchitis.

When reviewing all of the evidence set forth above, I continue to find that the existence of pneumoconiosis has not been established and I also continue to find that Claimant has established the existence of total disability. In so doing, I have considered all of the medical opinion evidence of record and have found the more recent evidence to be the most probative of Claimant's current condition.

Total Disability Due to Pneumoconiosis:

In a part 718 claim, Claimant has the burden of proving not only total disability, but also that the total disability is due to pneumoconiosis. Even if the arterial blood gas tests and pulmonary function studies are qualifying to prove total disability, the Board has consistently

6 Total disability under Section 718.204(b)(2)(iii) is inapplicable in this case because Claimant failed to present evidence of cor pulmonale with right-sided congestive heart failure.

held that blood gas tests and pulmonary function studies are not diagnostic of the etiology of respiratory impairment, but are diagnostic only of the severity of the impairment. *Tucker v. Director, OWCP,* 10 B.L.R. 1-35, 1-41 (1987). Thus a claimant who establishes total disability through arterial blood gas tests or pulmonary function studies has not also established that the disability is due to pneumoconiosis. *Id.*

Total disability due to pneumoconiosis requires that pneumoconiosis as defined in §718.201, be a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Substantially contributing cause is defined as having a "material adverse effect on the miner's respiratory or pulmonary condition" or as "materially worsen[ing] a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment." §718.204(c)(1)(i) &(ii). Absent a showing of cor pulmonale or that one of the presumptions of §718.305 are satisfied, it is not enough that a miner suffer from a disabling pulmonary or respiratory condition to establish that this condition was due to pneumoconiosis. *See* §718.204(c)(2). Total disability due to pneumoconiosis must be demonstrated by documented and reasoned medical reports. *Id*.

Upon reviewing all of the evidence of record I find that it fails to establish that Claimant is totally disabled due to pneumoconiosis per §718.204(c)(1). No evidence of cor pulmonale or evidence satisfying the presumptions of §718.305 has been offered. Drs. Kelly, Carter and Bosak opined that Claimant was totally disabled due to pneumoconiosis, however, I have found their opinions regarding the existence of pneumoconiosis to be poorly-reasoned and poorly-documented for the reasons stated above. As I do not find their opinions sufficient to establish the existence of pneumoconiosis, it follows that those opinions also fail to link any disability suffered by Claimant to that disease. Drs. Swann, Hudson and Fino found pneumoconiosis to be absent, while Dr. Repsher found that the existence of histologic pneumoconiosis could not be ruled out. He further found Claimant's impairment to be due to tobacco abuse. It is apparent that the opinions of the latter physicians cannot assist Claimant in establishing that his total disability is due to pneumoconiosis. Accordingly, I find that Claimant has failed to establish total disability due to pneumoconiosis.

Entitlement

Upon consideration of all of the evidence of record, I find that Claimant has failed to meet his burden of proof that he is totally disabled due to pneumoconiosis arising out of coal mine employment. Accordingly, he has failed to establish entitlement to benefits under the Act.

Attorney's Fees

The award of an attorney's fee under the Act is permitted only in cases in which Claimant is found to be entitled to benefits. Since benefits are not awarded in this case, the Act prohibits the charging of any fee to Claimant for services rendered to her in pursuit of this claim.

ORDER

IT IS HEREBY ORDERED that the claim of Edd T. Carroll for benefits under the Act is DENIED.

A

STEPHEN L. PURCELL
Administrative Law Judge

Washington, D.C.

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefit Review Board within 30 (thirty) days from the date of this Decision by filing a Notice of Appeal with the Benefits Review Board at P.O. Box 37601, Washington, D.C. 20013-7601. A copy of this Notice of Appeal must also be served on Donald S. Shire, Associate Solicitor for Black Lung Benefits, 200 Constitution Avenue,